testator by clauses 9 and 10 expressly empowered the trustees to postpone sale and to carry on the business "for such period as in their absolute discretion they may think fit" and for that purpose to invest in the business any part of his estate.

On this construction the answers to questions (a) and (b) on the first issue are in the affirmative, for in regard to (b) I hold that the express power to invest any part of the estate in the business includes the power to make the mortgages in question. See *Re Dimmock*: *Dimmock* v. *Dimmock*, 52 L.T. 494, *per* Kay J. at pp. 496 & 497.

This disposes of the case on its merits, for it follows that the plaintiffs' claim must fail and the suit be dismissed, but I do not wish to leave an impression in the minds of the parties, by confining my decision to the substantial point in issue, that I have rejected the contentions of the defendants' counsel on the second issue. Far from it. Had I come to a different conclusion on the merits I consider it only right to add that I take the view that as this suit is now framed and presented to the Court, the plaintiffs would not be entitled to a decree as prayed, or indeed to relief in a modified form; further I am at a loss to see how any amendment at this stage could be effectual and not involve fresh pleadings and a consideration of the case *de novo*.

I reserve the question of costs for further consideration.

Judgment accordingly.

Roland Braddell for the first defendants pointed out that the value of the subject matter of the claim in this suit was in the neighbourhood of $100,000.00 and that complicated questions of law were involved and applied for a certificate for two Counsel and for costs to be awarded against the next friend of the infant plaintiffs. He referred to *In Re Picton*, (1931) W.N. 254 and *Coote* on Mortgages (9th Edn.) Vol. II. pp. 1196 and 1197.

Gerahty, J. made the following supplementary order: "Suit dismissed with costs against the next friend without prejudice to the first defendant's right to charge their costs against the mortgaged property and without prejudice to the right, if any, of the next friend to an indemnity. Certificate for two Counsel allowed."

Solicitors for the Plaintiffs—

Allen & Gledhill.

Solicitors for the 1st Defendants—

Braddell Bros.

[APPELLATE CIVIL JURISDICTION]

HUGGARD, C.J., THORNE and GERAHTY, JJ.

March 1, 1934.

SAVENA SUPRAMANIAM PILLAY (Plaintiff) Appellant

vs.

TAN KAH CHIAT administrator of TAN KONG LIANG deceased .....(Defendant) Respondent

[SINGAPORE CIVIL APPEAL No 14 of 1933]

Practice—Form of Judgment against Administrator—General Judgment and Judgment de bonis testatoris—*Jurisdiction to amend Judgment when passed and entered—Civil Procedure Code, section 309.*

When an action is brought against an administrator and Judgment is entered against the Defendant *simpliciter*, this is a judgment *de bonis propriis* and does not entitle the Judgment Creditor to obtain satisfaction out of the assets of the deceased.

Once a judgment has been passed and entered the Court has no jurisdiction to amend it under the "slip order" section (section 309 of the Civil Procedure Code) unless there has been an accidental slip in drawing up the judgment, or unless the judgment as drawn up does not correctly state what the Court actually decided and intended. When a Plaintiff who sues a Defendant as administrator has entered up a default judgment against him *simpliciter*, the Court has no jurisdiction by means of a "slip order" to amend this to a form of judgment *de bonis testatoris*.

APPEAL from an order of the Judge made on an adjourned Summons in Chambers.

In this action the Plaintiff was a creditor who took proceedings against Tan Kah Chiat as the administrator of Tan Kong Liang deceased and in such proceedings Charles Clement Dunman was appointed to be Receiver by way of equitable execution of (*inter alia*) all the estate of Tan Kong Liang deceased. The date of the order appointing the Receiver was the 11th July, 1919 and by that order it was directed *inter alia* that the said Receiver should pay (*inter alia*) "All judgment and other debts due by the estate of Tan Kong Liang deceased including costs where costs are payable."

Subsequently in 1921 one Mutiah Chetty also commenced an action against the Defendant being Suit No. 709 of 1921 entitled "Between M. Mutiah Pillay, Plaintiff and Tan Kah Chiat Administrator of the estate and effects of Tan Kong Liang deceased, Defendant." The endorsement on the writ of summons also stated that the Defendant was sued as the administrator of Tan Kong Liang deceased. The writ was specially endorsed and the Statement of Claim set out the cause of action as being a claim on a promisory note made by the Defendant in favour of the Plaintiff. Tan Kah Chiat did not enter appearance and on the 31st May, 1921 the Plaintiff M. Mutiah Pillay

entered judgment in default. The judgment was in the following form:—"The defendant not having appeared to the writ of summons herein, final Judgment is hereby entered for the Plaintiff against the said Defendant." The Receiver disregarded the claim of M. Mutiah Pillay in paying claims pursuant to the Order of the 11th July, 1929.

Subsequently in 1931 M. Mutiah Pillay applied to the Court to amend the judgment obtained by him in Suit No. 709 of 1921 on the ground that his original claim had been against the Defendant as administrator of the estate of Tan Kong Liang deceased and that the judgment dated 31st May, 1921 was not in the usual form of a Judgment against an administrator. The application was made *ex parte* and was allowed by Order of Court dated the 4th September, 1931. Thereupon the said M. Mutiah Pillay made an application by way of Summons in Chambers in this present suit No. 274 of 1916 (being the suit in which the Receiver had been appointed) for payment by the Receiver to him of the amount of the judgment which he had obtained in Suit No. 709 of 1921. The Receiver contended that he had no assets in his hands and that all moneys received by him had been distributed prior to the amendment of the judgment on the 4th September, 1931. The application came before Mr. Justice Mills for hearing on the 24th July, 1933 and subsequent days and was dismissed the learned Judge holding that the original judgment dated the 31st May, 1921 was a judgment against the Defendant personally and that it did not amount to notice to the Receiver of a claim against the Estate of the Intestate.

From this decision the said M. Mutiah Pillay appealed. The Appeal came on for hearing on Tuesday, the 13th March, 1934 before the Court of Appeal in Singapore consisting of Huggard, C.J. Thorne and Gerahty, JJ.

Paul Storr for Appellant. The Judgment of the 31st May, 1921 was against Tan Kah Chiat as Administrator of the estate and effects of Tan Kong Liang, deceased. The title of the Defendant on the face of the Writ made this amply clear, the title being "Tan Kah Chiat, Administrator of the estate and effects of Tan Kong Liang, deceased" and the Judgment being entered against the said Defendant. Some effect must be given to the word "said" and the full effect could be by reference to the Defendant as mentioned in the title to the action.

Gorton v. *Gregory*.— The case followed by the learned Trial Judge was easily distinguishable from the present case and had no application to the present Application.

On the Amendment made in September, 1931 this amendment was correctly made, the original Judgment being against Tan Kah Chiat as Administrator of the estate and effects of Tan Kong Liang, deceased, and only altered the actual wording of the Judgment but in no way altered the substance. The Court must look more on the substance of the Judgment than on the actual form.

Laycock (*Burke* with him) for Respondent. The judgment of 1921 was a judgment in a general form namely Form 51 in Schedule A of the Civil Procedure Code. That form is evidently a form of judgment *levandum de bonis propriis*. In *Gorton* v. *Gregory*, (3 B. & S. 90) the judgment was a judgment against the Defendant *simpliciter* without any superadded words and it was there held that that was a judgment *de bonis propriis*. Such a judgment used formerly to be known as a "general judgment" against the Defendant in contra-distinction to a judgment *de bonis testatoris* (See *Rolle's* Abridgement, Vol. I. p. 930 sub. tit. Judgments *vers* Executors—*judgments generally*). In *Chettle* v. *Lees*, Holt, C.J., also distinguishes between a "general judgment" and "judgment *de bonis testatoris*." If the judgment is to be levied of the estate of the testator it should be in the statutory form No. 4(b) in Appendix F. to the Rules of the Supreme Court in England. The Defendant is a person and the words "Administrator of Tan Kong Liang deceased" merely indicates the capacity in which that person is sued. Therefore in the judgment the words "the Defendant" and "the said Defendant" can only refer to the person who is Defendant. It is not possible to sue the administrator of Tan Kong Liang deceased as such without naming the person because that is only one function of some person and to suggest that this is a judgment against the Defendant in his capacity as administrator is to confuse the person and his capacity or function. If the judgment is to be levied against the assets of the intestate the judgment must so state.

With regard to the amendment made in 1931 this amendment was made wrongly and without jurisdiction and accordingly is a mere nullity. *Ainsworth* v. *Wilding* (1896) 1 Ch. D. 673). *MacCarthy* v. *Agard*, (1933) 2 K.B. 417). *Hulbert* v. *Thurston*, (1931) W.N. 171) and *Karupaya* v. *Ramasamy Chetty & anor.*, 15 S.S.L.R. 6-7. In *Green* v. *Weatherill*, such an amendment is spoken of as being a common proceeding "in error" i.e. on appeal; but that is no authority for amending a judgment otherwise than on appeal and even in that case the Judge carefully distinguishes between a mistake of the party and a mistake of the Clerk (of the Court)

but even so the cases where such amendments have been allowed are all prior to the Judicature Act and the rules thereunder.

Storr in reply.

Cur. Ad. Vult.

HUGGARD, C.J.—This was an application by Muthia Pillay, claiming as a creditor of the estate of Tan Kong Liang deceased, for an order that the Receiver appointed in this action by way of equitable execution be ordered to pay to the Applicant the amount of the Judgment and costs (together with interest) obtained by him against the Defendant in Suit No. 709 of 1921.

The application came before Mr. Justice Mills who made no order on the application except as to costs.

From that decision the applicant has appealed.

The success or failure of this appeal depends on whether the Judgment obtained by the Appellant in 1921 affected the estate of Tan Kong Liang deceased or whether it was merely a personal Judgment against the Defendant Tan Kah Chiat.

The facts are these: In Suit No. 709 of 1921 the present Appellant sued the Defendant for balance of principal and interest due on a promissory note made and executed by the Defendant. The Writ was directed to Tan Kah Chiat, administrator of the estate and effects of Tan Kong Liang deceased and it bore the endorsement—"The defendant is sued as the administrator of the estate and effects of Tan Kong Liang deceased."

The Defendant failed to enter an appearance and it seems clear that, this being so, he must be deemed to have admitted assets and that the Plaintiff (the present Appellant) thus became entitled to enter Judgment either against the Defendant personally or against the Defendant in his representative capacity.

I have no doubt that it was the intention of the Plaintiff and his solicitors to enter Judgment against the Defendant in his representative capacity as they were entitled to do, but the question is did they in fact do so?

Where it is desired to enter Judgment against an executor or administrator in his representative capacity a particular form should be adopted. This form is to be found in the Annual Practice and is in fact the form into which the Judgment in the present case was amended in 1931 on the *ex parte* application of the present Appellant. Judgment was not, however, originally entered in that form in 1921 but as follows:—

> "The Defendant . . . . . not having appeared to Writ of Summons herein, final Judgment is hereby entered for the Plaintiff against the said Defendant . . . . for $5,300.03 and $61.08 for costs."

In my view this is nothing more than a personal Judgment against the Defendant.

Mr. Storr for the Appellant stresses the use of the word "said" in the Judgment as entered, and he argues that the expression "the said Defendant" can only mean "the Defendant as administrator of the estate and effects of Tan Kong Liang deceased" which is how the Defendant is described in the title. I cannot accept this view. The words "the *said* Defendant" appear in Form No. 51 in Schedule A to the Civil Procedure Code, which is the ordinary form of Final Judgment in default of appearance. In my opinion the word "said" merely refers to the Defendant as named in the Judgment and has no special significance.

The form of Judgment taken out in 1921 was, on the *ex parte* application of the present Appellant, amended in 1931 so as to make it a Judgment binding on the estate of the deceased Tan Kong Liang. This order was made under the Slip Order section—section 309 of the Civil Procedure Code. In my opinion this amendment was made without jurisdiction and must be disregarded.

As, in my view, the Judgment obtained by the Appellant in 1921 was merely a personal Judgment against the Defendant and did not entitle the Judgment Creditor to obtain satisfaction out of the assets of the deceased, it follows that the decision of the learned Judge in the Court below was correct and I would dismiss this appeal with costs.

THORNE, J.—I agree and have nothing to add.

GERAHTY, J.—I also agree and have nothing to add.

Appeal dismissed with costs.

Solicitors for the Appellant—*Drew & Napier.*

Solicitors for the Respondent—*John G. Campbell & Co.*